No. 7103

In the United States Circuit Court of Appeals for the Ninth Circuit

BELRIDGE OIL COMPANY, A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

SEWALL KEY,
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OPINION BELOW

The only previous opinion in the present case is that of the United States Board of Tax Appeals (R. 16–56), which is reported in 26 B.T.A. 810.

JURISDICTION

This appeal involves income and excess-profits taxes for the year 1921 in the amount of $45,293.85 and is taken from a decision (order of redetermination) of the Board of Tax Appeals entered August 17, 1932 (R. 56). The case is brought to this Court by petition for review filed November 15, 1932 (R. 57–62), pursuant to Section 1001–1003 of

the Revenue Act of 1926, c. 27, 44 Stat. 9, 109, 110, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286.

QUESTION PRESENTED

Whether the Board of Tax Appeals erred in finding that the actual cash value of an option for the purchase of land did not exceed $25,000, the amount paid therefor, at the time paid in to the petitioner for stock, the only evidence of a higher value being the opinions of witnesses of the value of the land itself.

STATUTE INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

> SEC. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivision (b) and (c) of this section):
>
> (1) Actual cash bona fide paid in for stock or shares;
>
> (2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus; * * *

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year; * * *

STATEMENT OF FACTS

The material facts are found by the Board of Tax Appeals and may be summarized as follows:

The petitioner is a California corporation, with its principal place of business at Los Angeles (R. 17), and was organized on January 25, 1911, for the purpose of acquiring the interests of certain individuals under an option for the purchase of land (R. 24). The land involved consisted of 30,845.96 acres in one parcel, situated in Kern County, California, between McKittrick and Lost Hills and was owned by Emily B. Hopkins of New York, who also owned a 55 percent interest in the Stearns Rancho Company, which originally owned and was engaged in the sale of approximately 300,000 acres of land in Southern California (R. 17–18).

In 1910 and 1911 the resident sales agent at Los Angeles for the Stearns Rancho Company was W. J. Hole (R. 17), who also purchased and sold property on his own account from time to time, usually in 1910 and 1911 effecting purchases by means of options for stated periods (R. 18). By reason of his success as agent for the Stearns Rancho Company, Hole in 1910 was able to obtain from Mrs. Hopkins for $1 and other valuable con-

siderations a written option for one year to purchase at $20 per acre the 30,845.96 acre tract in Kern County, with which property he had been familiar for six or eight years prior to 1910 (R. 18–19). The suitability of the land for agricultural purposes and the prospects of oil thereon, which were thought good because of the producing oil fields on both sides of the property, induced Hole to acquire the option (R. 19).

William Van Slyke, who had been engaged in the oil business since 1894 as a driller, superintendent of drillers, and prospector, was acquainted in 1910 with the Kern County tract of land here involved. He made several visits to the property in 1910 between June and December, the first for the purpose of locating boundary stakes, when he noticed oil structure and found oil sands on the property. On subsequent visits for the purpose of prospecting, he dug a surface trench extracting samples of the formation which he tested, and also dug a 14-foot hole which disclosed black oil sand, shale, dried out oil sand, and live oil sands, increasing in richness with depth. Concealing his discovery by covering the hole with plank, dirt, and brush, Van Slyke endeavored to acquire some of the land, which on January 5, 1911, was virgin territory for oil purposes other than as disclosed by Van Slyke's activities. He disclosed his findings to Max Whittier, a recognized expert in oil matters, who visited the property with him some time in December, 1910.

Whittier also was interviewed by Hole, whose efforts to interest others in the property under option to him until then had been unsuccessful, and being informed of the location and size of the property and Hole's option Whittier announced that he would go into the project. Thereafter Whittier conveyed the information in his possession to Burton E. Green, an oil operator of wide experience since 1895, who, accompanied by Van Slyke and Whittier, visited the property some time prior to January, 1911, and saw the oil croppings reported and the trench dug by Van Slyke, and also noted the similarity of the oil croppings there to those in the Lost Hills field on the northeast. This discovery was carefully guarded by these men and divulged to no one except M. J. Connell and Frank Buck who became original stockholders of the petitioner when incorporated (R. 19–21).

Hole, accompanied by Whittier, went to Green's office and after some discussion offered to sell the property at $33⅓ an acre and a one-fifth interest in the corporation later to be formed. Green agreed to take over the option on those terms, if the option could be redrawn to suit his requirements, which related particularly to the insertion of a provision whereby at least two wells, and as many more as desired, could be drilled within a year before the option had to be exercised. Hole was not advised of Van Slyke's discovery nor were Green and his associates advised of the terms of the

1910 option held by Hole. After three or four months' negotiation and delay, and considerable difficulty, entailing the expenditure of $125,000 to a nephew of Mrs. Hopkins and $35,000 and one fourth of Hole's stock in the company to Mrs. Hopkins' agent, a suitable option was agreed upon. Under date of January 5, 1911, Hole, acting for Green, who furnished the consideration, entered into an agreement with Emily B. Hopkins, whereby he paid her $25,000 for the option to purchase within one year from January 1, 1911, the Kern County tract of 30,845.96 acres, subject to certain pipe line, telephone, and telegraph rights and a certain lease for grazing purposes, for $33.33 per acre or a total sum of $1,028,198.67, with the provision that upon the exercise of the option within the year as specified the $25,000 paid for the option should be applied to the purchase price of the land (R. 21–23).

Under the option the holder thereof was entitled to drill four proper and suitable wells for the discovery of oil and gas, of which two were to be commenced as soon after the date of the option as equipment could be installed and water provided and two more within sixty days after completion or abandonment of the first two, using the same equipment, with the further privilege of drilling as many more wells as desired within the time specified for the four wells. It was provided that if

the first two wells proved dry and the latter two or either of them were not completed by January 1, 1912, the option to purchase should be extended until thirty days after the finding of oil and gas in and the completion of the last two wells, or the abandonment thereof. These provisions of the option, allowing the holder thereof to drill wells before being required to exercise the option to purchase, were the requirements which Green and Whittier, in their discussions with Hole and negotiations for the option, insisted upon before they would agree to take it over. Without these provisions Green and Whittier would not have proceeded with the transaction (R. 23).

On January 25, 1911, the option was assigned to the petitioner in consideration of $10 and other valuable consideration (R. 23). On the same date, the Board of Directors of petitioner at their first meeting accepted the proposal of Hole to assign the option to petitioner in consideration of the issuance to him of 999,995 shares of its stock and on January 26, 1911, there was issued to Hole of the total issue of 1,000,000 shares of stock, par value $1 per share, 999,995 shares, which pursuant to the prior understanding of the parties were divided between Hole, Green, Connell, Whittier, and Buck, and 25,000 shares placed in trust for one Henderson, the proposed general manager of the company, and such transfers and division were recorded in

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the books of the petitioner on February 1, 1911 (R. 24–25).

The first and second wells were begun on March 11 and March 18, 1911, respectively, and were completed on April 21 and April 7, 1911, respectively. Oil sand was struck in the first well at between 445 and 480 feet and in the second well at between 350 and 360 feet. Thirty days after completion the first well produced 100 barrels of oil a day, 25.3 degrees Baumé and the second well produced 100 barrels of oil a day, 26.5 degrees Baumé (R. 25).

The respondent has excluded from the petitioner's invested capital for 1921 "stock discount $974,995", representing that portion of the par value of capital stock, $999,995 issued in 1911 for the option upon the Hopkins property, in excess of the $25,000 originally paid therefor by Hole and his associates (R. 25).

SUMMARY OF ARGUMENT

The statute defines invested capital as the actual cash or the actual cash value of tangible property paid in for stock and paid in or earned surplus and undivided profits. The petitioner seeks to include in invested capital for 1921 the alleged value of an option for the purchase of land at the time paid in for stock January 25, 1911, claiming a value of $1,671,801.40. The option was obtained from the owner of the property by the promoters and

stockholders of the petitioner on January 5, 1911, for the sum of $25,000. The petitioner failed to sustain the burden of establishing that the option at the time paid in for stock had an actual cash value in excess of $25,000 cash paid therefor by its stockholders a few days prior thereto. The petitioner relied principally upon the opinion valuation of three witnesses to prove the value claimed. The Board of Tax Appeals is not bound to accept the opinions of experts, but may reject the same and determine the fact for itself from all the evidence in accordance with its own judgment and in the light of its own general knowledge and experience. In addition to the opinions of the experts there was in evidence the option agreement itself as well as the determination of the Commissioner, which was *prima facie* correct. The option agreement was entered into by parties fully informed of the facts in an arm's length transaction and the cash consideration paid therefor is the best evidence of the actual cash value of the option. The Board of Tax Appeals was fully warranted in refusing to adopt the opinions of the petitioner's witnesses. The evidence, moreover, amply supports the finding of the Board that the option had no value in excess of the $25,000 cash paid therefor. Under the settled rule that finding should not be disturbed.

ARGUMENT

The finding of the Board of Tax Appeals that the option which was paid in to petitioner for stock had no value at that time in excess of $25,000, the amount paid therefor by certain individuals, is supported by evidence and should be sustained. The option may be included in invested capital to the extent of the cost thereof, $25,000, and no more

The petitioner seeks to include in invested capital for 1921 the alleged value of the option for the purchase of prospective oil property which was paid in to it for $999,995 par value stock. It is contended that the actual cash value of the option at the time paid in was $1,671,801.40. The petitioner originally claimed that the option had an actual cash value at the time paid in of $1,028,198.60 and should be included in invested capital to the extent of the par value of the stock issued therefor (R. 7), but at the conclusion of the hearing the petitioner amended its petition to claim, as invested capital in addition to the par value of the stock, a paid-in surplus in the amount of $671,806.40 on account of the alleged excess value of the option (R. 143). The respondent contends, and the Board of Tax Appeals held, that the actual cash value of the option on January 25, 1911, when paid in to petitioner for stock, was not more than $25,000, the amount paid therefor on January 5, 1911, which amount may be included in invested capital on account of the option and no more.

Section 326 (a), so far as material, defines invested capital as the actual cash paid in for stock,

the actual cash value of tangible property paid in for stock at the time of such payment, and paid in or earned surplus and undivided profits. Under this statutory definition, the satisfaction of which is essential to the inclusion of any particular item in invested capital, tangible property paid in for stock may be included only to the extent of its *actual cash value at the time paid in* and in no case at more than the par value of the stock issued therefor, unless it is shown to be clearly and substantially in excess thereof in which event the excess may be treated as paid-in surplus. The manifest purpose of the statute is to limit the invested capital, which measures the normal return allowable as a deduction from income before imposition of the excess-profits tax, to money or money's worth *actually invested* in the business by the stockholders or by the corporation itself through application of its excess earnings. *La Belle Iron Works* v. *United States,* 256 U.S. 377; *Golden Cycle Corporation* v. *Commissioner,* 51 F. (2d) 927, 930 (C.C.A. 10th). The petitioner, therefore, is entitled to include the option in its invested capital only to the extent of its *actual cash value* at the time paid in for stock, January 25, 1911.

The actual cash value of the option when paid in to the petitioner for stock was the question before the Board of Tax Appeals, manifestly a pure question of fact. The Board, upon consideration of all the evidence, concluded that the actual cash value

of the option at the time paid in was $25,000, the amount paid therefor by the promoters of petitioner a few days before its organization, as determined and allowed by the respondent. Under the doctrine often laid down by the Circuit Courts of Appeals and sanctioned by the Supreme Court, the finding of the Board may not be disturbed if there is any evidence to sustain it (*American Sav. Bank & Trust Co.* v. *Burnet,* 45 F. (2d) 548 (C.C.A. 9th); *Simons Brick Co.* v. *Commissioner,* 45 F. (2d) 57 (C.C.A. 9th); *Fidelity Title & Trust Co. et al., Executors,* v. *Commissioner* (C.C.A. 3d), decided March 14, 1933, not officially reported but found in 333 C.C.H., p. 8579; *Saxman Coal & Coke Co.* v. *Commissioner,* 43 F. (2d) 556 (C.C.A. 3d); *Phillips* v. *Commissioner,* 283 U.S. 589; *Gloyd* v. *Commissioner* (C.C.A. 8th), decided March 2, 1933, not officially reported but found in 333 C.C.H., p. 8494; *Uncasville Mfg. Co.* v. *Commissioner,* 55 F. (2d) 893 (C.C.A. 2d), certiorari denied, 286 U.S. 545), and it must be remembered that the determination of the Commissioner is *prima facie* correct, the burden being upon the petitioner to establish error and prove all facts essential to a correct determination.

To support the value claimed, the petitioner offered and relied principally upon the opinions of three witnesses, one of the promotors and stockholders of the petitioner and two experienced geologists (R. 79–103; 112–143). Each of these

witnesses gave his opinion of the value of the property, which was in excess of the price stipulated in the option to be paid by petitioner for the land (R. 89, 127, 133). The difference between the smaller of these opinion valuations, $2,700,000, and the purchase price named in the option, $1,028,-198.67, the petitioner claims is the actual cash value of the option.

The rule, long ago laid down by the Supreme Court, that a trial tribunal is not bound by and need not accept the opinions of experts, as to value of property or other facts, even if there is no contradictory testimony, and is not only free to, but must, exercise its own judgment and reach a conclusion from all the evidence (*Head* v. *Hargrave,* 105 U.S. 45, 47–49; *The Conqueror,* 166 U.S. 110) is equally applicable to the Board of Tax Appeals, which exercise judicial functions. The Circuit Courts of Appeals repeatedly have held that the Board is not concluded by the opinions of experts, but giving them such weight as in its judgment they are entitled to, the Board should and must form its own conclusion and determine for itself the fact from all the evidence in accordance with its own judgment. *Fidelity Title & Trust Co., et al., Executors,* v. *Commissioner, supra; Saxman Coal & Coke Co.* v. *Commissioner, supra; Gloyd* v. *Commissioner, supra; Keystone Steel & Wire Co.* v. *Commissioner,* 62 F. (2d) 458 (C.C.A. 7th); *Grand Rapids Store Equipment Corporation* v. *Commis-*

sioner, 59 F. (2d) 914 (C.C.A. 6th); *Uncasville Mfg. Co.* v. *Commissioner, supra; Tracy* v. *Commissioner,* 53 F. (2d) 575, 577 (C.C.A. 6th), certiorari denied, 287 U.S. 632; *Anchor Co.* v. *Commissioner,* 42 F. (2d) 99, 100 (C.C.A. 4th); *Gessell* v. *Commissioner,* 41 F. (2d) 20, 22 (C.C.A. 7th); *Am-Plus Storage B. Co.* v. *Commissioner,* 35 F. (2d) 167, 169 (C.C.A. 7th).

In *Fidelity Title & Trust Co. et al., Executors,* v. *Commissioner, supra,* it was said (p. 8580):

> Much of the petitioners' contention is to the effect that the Commissioner underestimated the value of real estate owned by the Consolidated Gas Company and that the opinions of the experts who testified as to its value should have been accepted. It was pointed out in *Saxman Coal and Coke Co.* v. *Commissioner, supra,* that the Board of Tax Appeals is not bound by opinion evidence of experts but is at liberty to reject these opinions and form its own opinion on the facts presented.

In *Uncasville Mfg. Co.* v. *Commissioner, supra,* the Second Circuit Court of Appeals, sustaining the refusal of the Board to adopt the opinion valuation of property by an officer of the taxpayer, said (pp. 897–898):

> A jury need not accept the opinions of even a bevy of disinterested witnesses * * *; nor need a judge * * *. It is hard to see why the Board should be more constrained; it acts as a judicial body. * * *

> Perhaps when the issue is of facts of observation, where the truth depends only upon recollection and honesty, it may be otherwise, but of all things value is the most uncertain. Opinions about it are prophecies, whose truth cannot ordinarily be verified save where the property is in fungibles, and there is a concourse of buyers and sellers. As to property like that at bar the best opinion is little more than a guess. These factories were in the country, situated on streams, dependent in part upon them for power. They had their history, their good will, their own individuality; it was a most difficult matter even with disinterested evidence to arrive at their equivalent in money. * * *
>
> The company bore the risk of persuading the tribunal of its own selection. It has failed, and that failure is due to the inevitable unreliability of the evidence which it presented. * * *

Similarly, the Fourth Circuit Court of Appeals in *Anchor Co.* v. *Commissioner, supra,* confirming the Board's rejection of opinion testimony of value and approval of the Commissioner's determination, had this to say (p. 100):

> It is said that the Board had before it no evidence, except the testimony of Franklin, as to market value on March 1, 1913; but this ignores the determination of the Commissioner, which was before the Board, and, as shown above, was prima facie correct.

> And even if this were not true, we do not think that the Board, on the question of valuation, is to be held bound by the opinion of experts. Such evidence is competent, but it is not to be blindly followed. It should be weighed by the Board in the light of the other facts developed in the case and of the general knowledge and experience of the members, and is by them to be given only such weight as in the light thereof may seem to be just and reasonable. * * *

The controlling principle is concisely stated by the Eighth Circuit Court of Appeals in *Gloyd* v. *Commissioner, supra* (p. 8496):

> Of course there must be substantial evidence to support the finding of the Board or it cannot stand, but we do not understand the law to be that the Board is compelled to accept the evidence of experts as to value of property. It is within its province to accept such evidence in toto, in part, or not at all. Its weight is with the trial Board, and its worth is for its sound judgment to determine. It is not required to surrender its judgment to the judgment of experts. It is the one to determine the facts—not the experts.

The Seventh Circuit Court of Appeals in *Am-Plus Storage B. Co.* v. *Commissioner, supra,* speaking of purely opinion evidence, aptly pointed out (p. 169):

> Such opinions, as is usual, were expressed with respect to the point upon which the

> Board was required to pass. Such evidence, while competent and often exceedingly helpful, is not considered binding, in the sense that a tribunal before whom it is adduced is required to accept it, where same is contrary to the tribunal's own judgment of the result of the facts upon which the opinion evidence is based. * * *

Planters' Operating Co. v. *Commissioner,* 55 F. (2d) 583 (C.C.A. 8th); *Bonwit, Teller & Co.* v. *Commissioner,* 53 F. (2d) 381 (C.C.A. 2d); *Nichols* v. *Commissioner,* 44 F. (2d) 157 (C.C.A. 3d); *Pittsburgh Hotels Co.* v. *Commissioner,* 43 F. (2d) 345 (C.C.A. 3d); *Boggs & Buhl* v. *Commissioner,* 34 F. (2d) 859 (C.C.A. 3d), cannot be interpreted as holding, contrary to the cases cited above, that the Board of Tax Appeals is bound by opinion testimony. In each of those cases the court, recognizing the rule that the Board may disregard expert testimony, held only that the finding of the Board must be supported by some evidence. The fair deduction to be drawn from those cases is that the Board is not bound to adopt the opinions of experts, even if there be no other evidence in the case, but if it rejects the same it cannot by mere conjecture make an arbitrary finding unsupported by any evidence. See *Gloyd* v. *Commissioner, supra.* Similarly, in *Citrus Soap Co. of California* v. *Lucas,* 42 F. (2d) 372 (C.C.A. 9th), it was held only that testimony of a qualified witness was competent evidence and not that the Board of Tax

Appeals was bound to accept the opinion of the witness, the Court particularly pointing out that it was for the Board to determine the fact.

Substantially the only evidence introduced by the petitioner to support the alleged value of the option consisted of the opinions of three witnesses. William G. Van Slyke, one of the original parties interested in the property covered by the option here involved and a stockholder of the petitioner, testified that upon a visit to this property in 1910 he noticed oil structure and on a subsequent visit dug a fourteen-foot hole thereon which disclosed oil sand, which he tested and found to be live oil sand (R. 76–78). Burton E. Green, an experienced oil man and the responsible party in the negotiations and the one who furnished the cash paid for the option on the property in question and who was advised of Van Slyke's discovery (R. 79–83), testified that in his opinion the property covered by the option was worth $100 per acre or approximately $3,100,000 for the tract (R. 87, 89). Green had been on the property and viewed the formation and the outcroppings of apparent oil structure, which was similar to that of the Lost Hills oil field in the Northeast (R. 82). He based his opinion principally upon the price he said had been paid for property in the Lost Hills section (R. 94), but he did not know by whom or to whom such sales had been made and apparently his information of such sales amounted to nothing more than "the talk

at the time'' (R. 101). Moreover, it appears that at the time of the sales in the Lost Hills section such property was either proven oil land or just off the producing oil land (R. 94–95, 101), while the property covered by the option here in question was virgin territory (R. 94). Harry R. Johnson, a geologist who had made a number of surveys of oil properties in California and in the vicinity of the property here involved, and who was familiar with this property in 1910 and 1911, testified to the similarity of this property and the Lost Hills fields (R. 112–115), but he visited this property for the purpose of obtaining specimens and samples and making tests only about two weeks before the date of the hearing of this case (R. 125). He testified that in his opinion the actual cash or fair market value of the property covered by this option was $2,900,000 (R. 129), basing his opinion upon methods he said were used by geologists in determining values of prospective territory (R. 127), which methods, however, he did not undertake to explain. W. W. Orcutt, another geologist, having heard the testimony of the other witnesses as to the contour and topography of this property and the oil formation or structure, and having been on the property about a week prior to the hearing of this case, confirmed the testimony as to the contour and topography of the land and testified that in his opinion the fair market value of the property was $2,700,000 (R. 131–133). He based his opinion

upon the similarity of the outcroppings and structure of his property and the several oil fields in Southern California, from which it appeared that the property would make a good oil field (R. 134).

Petitioner also offered in evidence the minutes of the meeting of the Associated Oil Company held on September 6, 1910, evidencing the purchase by that company in July 1910 of certain property in Kern County at a net cost of $66⅔ per acre (R. 73–75, 156–166). No evidence was offered, however, to show that the two properties were comparable. It was not shown whether the property purchased was virgin or proven oil territory.

In addition to the foregoing, the record discloses that the option here in question was obtained from the owner, Emily B. Hopkins, through W. J. Hole, who was the agent for a real estate company, in which Mrs. Hopkins held the majority interest. Hole also held a year's option to purchase this property at $20 per acre, which he had obtained without consideration in May 1910, but until he interviewed Green, Whittier, and Van Slyke he had been unable to interest others in the property (R. 64–68). Although Hole was not advised of Van Slyke's findings on the property until after the option of January 1911, here involved, for the purchase of the property at $33⅓ an acre had been agreed upon, he knew that the land presented very good prospects for oil and that it lay between two producing oil fields (R. 67, 70–72). The option

agreement was in evidence (R. 144–155) and its terms clearly disclose that the owner of the property, Mrs. Hopkins, was fully cognizant of the oil prospects of the land and of the purpose of the option (R. 148–153). It also was testified that the property in question, lying between, and within six to nine miles of, proven oil fields, was decidedly similar to one of the proven fields (R. 115) and that a practical oil man viewing the property would naturally conclude that it was oil land (R. 124). It also was testified that other oil companies had had scouts over the property (R. 98), yet there is no evidence of any effort being made to acquire this property and indeed W. J. Hole had been unsuccessful in his endeavors to interest others in the project.

Moreover, the option agreement was not finally consummated until after extended negotiations of three or four months with the owner (R. 70, 83), and then Green and his associates would not accept the option until a provision was inserted allowing them to drill as many wells as they desired within the period of the option for the purpose of discovering oil before they should be required to purchase the property on the terms agreed upon, or in other words to prove the property as oil producing (R. 83, 149–152). Thus it would appear that Green and his associates were not so sure at the date of the option of the value of the property as an oil producer as to obligate themselves to pur-

chase it at the stipulated price, they insisted upon definitely establishing the fact before assuming so large an expenditure as more than a million dollars. Green and his associates, as practical oil men, knew there could be no reasonable certainty that the property would prove a productive field. As said by the Board of Tax Appeals in the prior proceeding involving the identical question here presented, for earlier years (11 B.T.A. 127, 136):

> Oil and gas are of a fugitive nature. They hide in the deep recesses of the earth where the eye of man may not penetrate. The sorry experience of thousands of investors proves that their exact location may seldom, if ever, be divined with precision and certainty. Not every oil seepage or outcrop of oil sand indicates the presence of oil in profitable quantities. A few yards only may separate the gusher from the dry hole. Of a truth, the test of an oil property is the drilling thereof.

In this connection compare also, *Coalinga-Mohawk Oil Co.* v. *Commissioner* (C.C.A. 9th), decided April 3, 1933, not officially reported but found in 333 C.C.H., p. 8671. Mrs. Hopkins, and anyone else who might have been interested, obviously knew that the property was located near producing oil fields and must have been cognizant of such prospects for oil as the land presented, and accordingly possessed as much knowledge of the value of the land as Green and his associates. It seems plain

that the option agreement was entered into between parties, equally informed, in an arm's length transaction and the consideration therefor, $25,000, was mutually agreed upon as the fair value of the option to purchase at the specified price. The consideration thus fixed by the parties themselves, after months of negotiation, would seem to be the best evidence of the actual cash value of the option paid in to the petitioner only a few days after consummation of the agreement. Cf. *Thomas A. O'Donnell* v. *Commissioner* (C.C.A. 9th), decided April 8, 1933, not officially reported but found in 333 C.C.H., p. 8692.

In the light of these facts, it is submitted, the Board of Tax Appeals was amply justified in refusing to adopt the opinions of petitioner's witnesses as to the value of the option. Of all things value is the most uncertain and opinions about it are little more than prophecies. *Uncasville Mfg. Co.* v. *Commissioner, supra.* It is not accurate to say that the Board had before it no other evidence than the opinions of the witnesses. The Commissioner's determination, which is *prima facie* correct, was before the Board and also the option agreement, as well as the testimony relative to the character of the property. See *Anchor Co.* v. *Commissioner, supra.* All the facts upon which the witnesses purported to base their opinions were in evidence and not only was the Board competent, but it was the Board's duty to form its own opinion and make a

finding of the value of the option from all the facts in accordance with its own judgment. The evidence, we submit, abundantly supports the finding and conclusion of the Board.

CONCLUSION

The decision of the Board of Tax Appeals is correct and should be affirmed.

Respectfully,

SEWALL KEY,
JOHN MACC. HUDSON,
Special Assistants to the Attorney General.

MAY 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933